

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027  
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING  
ON ORA MOTION TO COMPEL**

This ruling resolves as follows, the motion filed on June 21, 2005, by the Office of Ratepayer Advocates (ORA) for an Order Compelling Compliance with Rule 74.3 and Data Request 6-8 (Motion"). In support of its Motion, ORA attached the Supporting Declaration of Christopher Witteman. In its Motion, ORA seeks an order requiring production of information relating to Applicants' showing regarding synergies from the proposed transaction based upon its "synergy model." The model is a collection of Excel spreadsheets in three versions: pre- and post-signing national versions; and a California version.

In its Motion, ORA specifically seeks an order requiring Applicants to produce the following:

- Disclosure of inputs and sources of data, algorithms, outputs (including alternative outputs), and other information required by Rule 74.3, used on the national synergy model, including its pre--

signing and post-signing iterations. Disclosure is to be straightforward and clearly identified;

- The actual files and reports used as inputs and/or to generate data used by the national synergy models, including the files listed in confidential attachment 4 to the Response to Qwest Motion, *and* any other files used;
- A complete and unedited electronic version of the model (including lower-hierarchy input files) in a way which restores any removed links in the model so ORA and other parties can understand how lower-hierarchy files provide the basis for the final model output; and
- The two CDs of Excel files produced to the FCC, and any other as-yet unproduced documents or information provided by Applicants to the FCC.

ORA claims that the production of the above-referenced data and materials is required for Applicants to comply with Pub. Util. Code § 1822, and Rule 74.3 of the Commission's Rules of Practice and Procedure. Pub. Util. Code § 1822 provides, in relevant part:

- (a) Any computer model that is the basis for any testimony or exhibit in a hearing or proceeding before the commission shall be available to, and subject to verification by, the commission and parties to the hearing or proceedings to the extent necessary for cross-examination or rebuttal ... .
- (b) Any *testimony* presented in a hearing or proceeding before the commission that is based in whole, or in part, on a computer model *shall include a listing of all the equations and assumptions built into the model.*
- (c) *Any data base* that is used for any testimony or exhibit in a hearing or proceeding before the commission shall be *reasonably accessible* to the commission staff and parties to the hearing or proceeding to the extent necessary for cross-examination or

rebuttal, subject to applicable rules of evidence, as applied in commission proceedings.

Rule 74.3(b) further specifies the information to be provided at the time information produced by a computer model or program is submitted. This information includes:

- (1) A description of the source of all input data;
- (2) The complete set of input data (input file) as used in the sponsoring party's computer run(s);
- (3) Documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output, including but not limited to a manual which includes:
  - (i) A complete list of variables (input record types), input record formats, and a description of how input files are created and data entered as used in the sponsoring party's computer model(s).
  - (ii) A complete description of how the model operates and its logic. This description may make use of equations, algorithms, flow charts, or other descriptive techniques.
  - (iii) A description of a diagnostics and output report formats as necessary to understand the model's operation.
- (4) A complete set of output files relied on to prepare or support the testimony or exhibits; and
- (5) A description of post-processing requirements of the model output.

**Disclosure of inputs and sources of data, algorithms, outputs and Production of the actual files and reports used as inputs and/or to generate Data used by the national synergy models**

**Parties' Positions**

ORA seeks production of the inputs and sources of data, algorithms, outputs for the national synergy models. ORA also seeks production of the actual files and reports used as inputs and/or to generate data used by the

national synergy models, including the files listed in confidential Attachment 4 to the Response to the previous Qwest Motion, *and* any other files used in compliance with Rule 74(b)(3).

Applicants included outputs derived from the national synergy model as Exhibit 1 to their Supplemental Application filed March 30, 2005. ORA argues that in order for parties to understand the national and California synergy models, all of the inputs and algorithms used to produce the outputs of the model must be identified. ORA, however, claims that Applicants have not provided clear identification of such information.

Although previous ALJ rulings have affirmed the rights of ORA and TURN to review the model, ORA denies that “reasonable” or “complete” access to the model has been provided. ORA has: (1) reviewed hard copy outputs from the model; (2) met with SBC to receive an oral presentation describing the hard copy output; (3) worked with a redacted version of the model at SBC’s counsel’s offices; and (4) worked with a version of the model that allowed the redacted portions to be viewed. ORA claims that none of these methods has provided the level of access to the model required by Rule 74.3.

ORA also states that major inputs which appear to have been linked and logically part of the model in an earlier incarnation, have not been found in ORA’s current review of the model at counsel’s office. ORA believes that it still does not have access to all of the computer files and background information, which are either part of the model, or inputs and assumptions thereto. Accordingly, ORA seeks an order compelling SBC to provide unambiguous and clearly identified disclosure of the information as required by Section 1822 and Rule 74.3.

Applicants claim they have complied with Rule 74.3(b)(1)-(2) by providing ORA with the source of all input data for the Models, and direct access to the input and output files. Applicants attached the Declaration of Rick Moore (Moore Declaration) to support the contention that Applicants have complied with Rule 74.3. As affirmed in the Moore Declaration, SBC relied on standard features available in any off-the-shelf Microsoft Excel program, and did not develop a separate training manual for the Models, nor use any independent algorithms or logarithms. (*Id.*, ¶ 10.) Thus, SBC disputes ORA's assertion that it has not been given access to the "algorithms" used by the Models, and affirms that the only mathematical calculations in the Models are addition, subtraction, multiplication and division. ORA thus can view and print out the calculations performed by each cell in the Models.

Applicants produced at least one version of the national synergy model in "native" electronic form (i.e., Excel spreadsheets) to the FCC. To date, however, Applicants have not produced any electronic model itself to ORA. ORA states that the CDs provided to it do not contain the electronic model(s) and other electronic documents submitted to the FCC.

ORA seeks a complete and unedited electronic copy of the entire national synergy model (including lower-hierarchy input files) in a way which restores any removed links in the model to reveal how lower-hierarchy files provide the basis for the final model output. ORA seeks production of a copy of both the pre- and post signing versions of the models with all related computer files, including the specific files named in the list of missing files, and all files that were at one time dynamically linked to or used as inputs for the national model. Among these, ORA seeks all files that served as inputs for the model, either directly or indirectly, including the files named in the attached Supporting

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Declaration, other relevant files, and the file or files used to establish the “base case” for SBC.

ORA argues that Applicants' restrictions on access has precluded a full analysis of the model. These restrictions have included a "no copies" rule (sometimes lifted, sometimes re-imposed), a proctor monitoring ORA's access to and work with the model, and the requirement that ORA travel to separate locations to view separate parts of the model. Access to other electronic files produced to the FCC, but not to ORA, has been similarly limited, with access provided only at counsel's office and with a "no copies" rule.

Applicants respond that they have provided ORA with a copy of the California Model and access to "native," unedited, manipulable, electronic versions of the other Models. (Moore Decl. ¶ 6.) Applicants claim they complied with Rule 74.3(b)(4) by attaching Exhibit 1 to their Supplemental Application, and describing the methodology used in the Supplemental Application.<sup>1</sup>

Applicants claim that ORA has had full and fair access to the Model pursuant to the ALJ's May 20 Ruling, and has made no showing why it needs its own copy of the Model. Applicants claim that they have complied with Rule 74.3(b)(3) by providing ORA with access to the Models, which are Excel spreadsheets. (Moore Decl. ¶¶ 3, 9.)

ORA claims that since the Applicants have produced the model to the FCC, production of the model is responsive to ORA Data Request 6-8 which asked for all documents as produced to the FCC. On June 2, however, ORA's counsel agreed that ORA would not require production of "native" files

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<sup>1</sup> Rule 74(b)(5), which requires "[a] description of post-processing requirements of the model output," logically applies to models where it is not apparent what the output means. Applicants state this is not the case here, and in any event the Models have no post-processing requirements.

produced to the FCC, and instead would “resolve all outstanding disputes related to this [data] request [6-8] for the so-called ‘FCC documents’ by accepting the production of all of these documents as Bates-numbered .pdf files on disk.” This agreement was memorialized in the ALJ’s June 8 Ruling. Applicants argue that ORA should be held to this prior agreement.

SBC claims it has offered to make its subject-matter experts available to discuss ORA’s concerns with ORA consultants, but ORA refused, requiring that all discussions take place in writing, and between counsel.

### **Discussion**

ORA’s request for the production of inputs, algorithms, and outputs is premised on the belief that it still lacks access to all of the computer files and background information, which are either part of the model, or inputs and assumptions thereto. This claim, in turn, appears to be based on ORA’s belief that inputs which appeared to have been linked and logically part of the model in an earlier incarnation, were not been found in ORA’s subsequent review of the model at counsel’s office. The existence of one computer file was unknown to ORA until June 2, 2005 (as discussed in its response to the previously filed Qwest Motion to Compel). ORA thus claims that the model, at least as produced to ORA, cannot be relied upon to disclose all component files or source files of the inputs, assumptions, logarithms or outputs. (See ORA e-mail of June 9 at 12:25 p.m. in Attachment 1 to ORA Response to Qwest Motion; See also Supporting Declaration, at ¶¶ 9-16) ORA suspects that additional computer files relate to the model that have not been provided.



Applicants deny allegations that the model is incomplete or that files have been “delinked.” SBC states that it informed ORA repeatedly during meet and confer session that this was not the case,<sup>2</sup> and confirmed it under oath through Mr. Moore’s declaration. (Moore Decl. ¶ 13.) As explained in the Moore Declaration, SBC affirms that it has not removed any embedded links or otherwise de-linked in any way the Models and Worksheets from each other or from any other document.

Based on review of parties’ pleadings, the dispute seems to come down to whether SBC is truthful when it insists that all information regarding the model required by Rule 74.3 has been provided to ORA. SBC informed ORA during meet and confer session,<sup>3</sup> and as confirmed at paragraph 12 of the Moore Declaration, SBC does not possess the file identified in ORA’s motion as previously missing and did not use it to generate or run any of the Models. Given SBC’s representations, it is reasonable to conclude that no further information or missing files are available that have not already been provided to ORA, with the possible exception of the two CD files identified in the discussion below. Thus, beyond these two CD files there does not appear to be anything further to be turned over to ORA in reference to inputs, algorithms, or outputs pursuant to Rule 74.3.

The remaining issue is whether a separate “native” copy of the model, itself, should be turned over to ORA. SBC argues that providing ORA with its own “native” copy of the pre-signing National Model would undermine the

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<sup>2</sup> Att. 1 to ORA Reply to Qwest Mot. to Delay (Patrick Thompson emails).

<sup>3</sup> Att. 1 to ORA Reply to Qwest Mot. to Delay (Patrick Thompson emails).

restrictions the ALJ placed on ORA's use of the model in the May 20 Ruling. SBC argues that ORA has had a full and fair opportunity to review both the pre and post-signing electronic Model, and has made no showing why it needs its own copy of one of the two national Models. SBC opposes providing ORA its own copy, arguing that SBC needs to maintain custody and control of the Model.

It is concluded that while ORA expresses frustration about inconveniences and difficulties it has experienced in reviewing the model under the restrictions imposed by SBC, ORA has not been denied access under Rule 74.3. The previous ALJ ruling weighed the offsetting burdens on parties of additional restrictions on access to the model data versus SBC's proprietary concerns as to the commercial sensitivity of the models, and prescribed a process intended to balance these offsetting concerns. ORA has not shown how the balance struck in that ruling fails to result in compliance with Rule 74.3. Thus Applicants shall not be required to produce a separate "native" copy of the model. This disposition appears to be consistent with the agreement into which ORA entered with Applicants on June 2, as noted above. ORA previously agreed to accept the production of model-related documents as Bates-numbered .pdf files on disk rather than in "native" format.

## **Production of FCC Documents**

### **Parties' Positions**

ORA claims that Applicants have failed to provide all documents that are fully responsive to ORA Data Request 6-8 which asked the Applicants to:

Please provide to ORA the joint applicants' responses to the FCC's Initial Information and Document Request of April 18, 2005, with all supporting documentation and data. Provide all sealed/confidential documents, too. Applicants have informed ORA that among the documents given to the FCC were certain "native Excel documents,"<sup>4</sup> including those related to the national synergy model.

ORA gave Applicants until May 11, 2005, to provide copies of documents that had been provided to the FCC. Yet, ORA was informed by SBC counsel on May 11, 2005, that they had made no preparation, inquiry or effort to provide to ORA copies of the FCC documents. See Exhibit 6 to ORA Response to Qwest Motion (cross-emails of May 11-12, 2005, confirming meet and confer conference, indicating that SBC counsel "not personally aware" of the FCC documents at time of conference, but that SBC "fully intend(s) to make the materials available" at some undetermined future point). Subsequent negotiations with Applicants left ORA unsure of whether Applicants would produce all of the FCC documents. As a consequence, ORA included Request 6-8 in its Second Motion to Compel, filed on May 27, 2005.

ORA's counsel believed he had reached an "oral agreement" with SBC counsel that all the FCC material would be produced on CDs. (Supporting Declaration, at ¶ 6.) SBC's outside counsel Mr. Dorgan represented to Assigned ALJ Pulsifer, in his June 6, 2005 email that "SBC informed ORA on Friday, June 3 that it would provide ORA (because of its status as a division of this Commission) with CDs of the [FCC] material." (*Id.* at ¶6 and Exhibit 2.) The ALJ

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<sup>4</sup> See Exhibit 3 attached hereto (Kolto June 3, 2005 email, also found as Attachment 7 to ORA's Response to Qwest Motion, filed June 17, 2005.)

ruling on June 8th, requiring producing of the CDs on or before June 14, 2005, was conditioned on this representation:

Yet, ORA now understands that Applicants were *not* agreeing to provide on CD *all* of the files and materials produced to the FCC, but that in fact Applicants were *holding back* certain Excel files apparently part of, or related to, the synergy model. (See Kolto email of June 3, 2005, Exhibit 3.)

On June 14, 2005, ORA visited the office of AT&T's counsel to view previously un-produced materials germane to (or part of) the model. ORA is unclear as to whether these materials were produced to the FCC. On June 16, 2005, ORA viewed two CDs of Excel documents (one of which contained the model) at the offices of SBC's counsel, files that had been produced to the FCC. (See Hieta Declaration, filed as Exhibit 8 to Response of ORA in Support of Qwest's Motion to Modify the Schedule.) ORA thus moves for the production of both of these CDs, as well as any other materials provided to the FCC but not to ORA.

SBC states that on June 3, ORA's counsel wrote the ALJ that "ORA has offered to both SBC and AT&T to resolve all outstanding disputes related to this request for the so-called 'FCC documents' by accepting the production of all of these documents as Bates-numbered .pdf files on disk." (Wittelman Decl. Ex. 2.) SBC argues that ORA fully understood when it made this offer that production of "Bates-numbered .pdf files" would not include files in "native" format. Files in .pdf format are scanned and converted to Adobe Acrobat. ORA had originally asked in its May 27 moving papers for the FCC materials to be produced in

“native” format, demonstrating it knew the difference.<sup>5</sup> ORA’s June 3 agreement to resolve “all outstanding disputes” related to request 6-8 by accepting a .pdf production was a compromise from its request for “native” files.<sup>6</sup>

SBC claims that ORA now seeks to “renege on its agreement,” by seeking production of all “native” files in the materials provided to the FCC in addition to the .pdf production it previously informed the ALJ would “resolve all outstanding disputes related to [request 6-8].” SBC argues that granting ORA’s motion would invite parties to reopen settled discovery disputes even when, as in this case, the parties’ previous agreement is memorialized in an ALJ ruling.

## **Discussion**

Parties’ disagreement on this issue appear to relate to an apparent miscommunication and/or misunderstanding about what was entailed in the agreement to accept production of all of the so-called “FCC documents” as Bates-numbered .pdf files on disk, versus an expanded request for “native” files. Thus, the question is whether ORA, in its request for production of the two additional CDs is improperly “reneging” on its agreement, or rather, merely seeking full disclosure under what ORA understood to be the terms of the original agreement. ORA claims it understood the agreement to be that Applicants

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<sup>5</sup> See Second Motion of the Office of Ratepayer Advocates to Compel Discovery Responses, filed May 27, 2005, at 10 (“ORA therefore seeks an order compelling Applicants to provide all such copies if ORA requires, so that there will be no delay or difficulty if ORA needs to request this material in the future, and to produce them in their “native form” and pursuant to the suggestions for a protocol on electronic documents.”)

<sup>6</sup> Applicants deny ORA’s claim that SBC somehow misled the Commission when it emailed on June 3 that it would accept ORA’s proposed compromise and provide the .pdf files on CD.

would provide on CD all of the files and materials produced to the FCC, but now understands that Applicants were holding back certain Excel files apparently part of, or related to, the synergy model.

After reviewing both parties' pleadings, it is not entirely clear where the source of the misunderstanding lies as to the oral agreement. In any event, to the extent that the two CD disks in question contain data that is part of the .pdf production to which ORA agreed, then Applicants shall be required to produce that portion of the CD disks to ORA. On the other hand, to the extent that the two CD disks in question contain "native" files that are in addition to the .pdf production, Applicants shall not be required to produce that portion of the CD disks. Based on Applicants' representations, the production of these two CDs to the extent ordered above shall be deemed to constitute a complete response to ORA's request on this matter.

**IT IS RULED** that:

1. The Office of Ratepayer Advocates' (ORA) Motion is granted, in part, and denied in part, to the extent set forth below.
2. To the extent that the two CD disks sought by ORA contain data that is part of the .pdf production to which ORA agreed, then Applicants shall be required to produce that portion of the CD disks in question to ORA. On the other hand, to the extent that the two CD disks in question contain "native" files that are in addition to the .pdf production, Applicants shall not be required to produce that portion of the CD disks.
3. Based on Applicants' representations, no additional inputs, algorithms, or outputs have been identified that have not already been produced to ORA. Accordingly, in response to the ORA Motion, subject to Ordering Paragraph 2

above, there is nothing further to require of Applicants with respect to identification of inputs, algorithms or outputs relating to the synergy models.

4. Applicants shall not be required to produce for ORA an entirely separate copy of national synergy model versions in “native” format. ORA has previously agreed to accept the production of model-related documents as Bates-numbered .pdf files on disk rather than in “native” format.

Dated June 30, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge



**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling on ORA Motion to Compel on all parties of record in this proceeding or their attorneys of record.

Dated June 30, 2005, at San Francisco, California.

/s/ FANNIE SID

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Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.